***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S REPLY BRIEF

# 77-1409

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

BLAIR WATSON,

Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

BLAIR WATSON,

Appellant.

Docket No.
77-1409

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REPLY BRIEF FOR APPELLANT
BLAIR WATSON

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POINT I

THE INSTANT CASE IS DISTINGUISHABLE FROM THE RECENT CASE OF UNITED STATES V. TOLLIVER.

Since the date of filing of Appellant's original brief, this Honorable Court has decided another case dealing with some of the same issues raised in this appeal. United States v. Tolliver, Dkt. No. 77-1017, Slip op. 863 (2d Cir. January 3, 1978).

Although the Government apparently feels that the Tolliver decision is dispositive of the instant case, it is respectfully submitted that Tolliver can be distinguished on its facts, and in reality supports the arguments of Appellant.

Tolliver dealt with a lineup held in the presence of defense counsel. After the lineup, the defense attorney was prohibited from attending an interview of the witness by

the U.S. Attorney and the F.B.I. Agents. At the interview, the witness was asked if he could identify anybody from the lineup.

This Court held that a defendant's right to confrontation and assistance of counsel does not include a right to have counsel present at a post-lineup interview. The Court held that the actual confrontation between the witness and the participants in the lineup is the only "critical stage" of the proceedings requiring the presence of counsel.

However, in the instant case, the defense attorney was not allowed to be present even at the time of the confrontation. He was required to remain in the same room as the participants in the lineup, while the witness, prosecutor, and Treasury Agent viewed the lineup from a separate room.

Thus the defense attorney was not able to hear whether any suggestive comments were made to the witness either before or during the actual lineup, and therefore he was not allowed to be present during a "critical stage" of the proceedings.

The Constitutional deprivation herein certainly amounted to more than harmless error. In Tolliver, supra, the eyewitness identification of the defendant played a relatively minor role, since other evidence, both direct and circumstantial, connected him with the alleged bank robbery.

In the instant case, however, eyewitness identification of the Appellant constituted the prosecutor's entire case,

and if the District Court had suppressed the identification which arose from the unconstitutional lineup, the trial jury might well have rendered a different verdict.

## POINT II

### THE DEFENSE ATTORNEY DID NOT WAIVE HIS RIGHT TO HAVE A WADE HEARING PRIOR TO THE TESTIMONY OF TRIA

One of the points of Appellant's brief is that the District Court judge failed to hold a Wade hearing in regard to the constitutionality of the lineup procedure utilized with the witness Tria.

The Government states that the defense attorney "did not ask the Court to make a pretrial determination of whether there was an independent basis for Tria's anticipated in-court identification. Appellant may not now raise an objection that should properly have been made prior to Tria's testimony." (Gov't Brief, p. 12).

A reading of the record clearly shows that defense counsel did indeed request a Wade hearing and that the Trial Court stated that a "mini-Wade hearing" would be held outside the presence of the jury after the lineup had taken place. (T.6/28, p. 136). Such a mini-Wade hearing was never held, and the failure to hold the hearing was an issue which was preserved for appellate review.

Respectfully submitted,
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C 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

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80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES OF AMERICA,

*Plaintiff*

*against*

BLAIR WATSON,

*Defendant*

*Index No.* 77-1409

***AFFIDAVIT OF SERVICE BY MAIL***

*STATE OF NEW YORK, COUNTY OF* KINGS *ss.:*

*The undersigned being duly sworn, deposes and says:*

*Deponent is not a party to the action, is over 18 years of age and resides at*

186 Joralemon Street, Brooklyn, New York 11201

*That on the* 1st *day of* February *19* 78 *deponent served the annexed*

Reply Brief

*on* David G. Trager, United States Attorney

*attorney(s) for* Appellee

*in this action at* 225 Cadman Plaza East, Brooklyn, New York 11201

*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.*

*Sworn to before me*

*this* 1st *day of* February *19* 78

Peter J. Fabricant

*The name signed must be printed beneath*

PETER J. FABRICANT

Christine A. Scott

CHRISTINE A. SCOTT
Notary Public, State of New York
No. 24-1032580
Qualified in Kings County
Commission Expires March 30, 1979